that the assistant official assignee had been misinformed as to the date on which judgment was passed. I mention it because it might give rise to the inference that the magistrate did in fact postpone the hearing to that date. The fact is that the judgment was passed on the 12th and not on the 24th of September.

Under Order XIX rule 3(1)(b)(i) of the Subordinate Courts Rules, judgment may be entered by default in the absence of a defendant if the claim is for a liquidated sum. A "liquidated sum" as I understand that term, is an amount which is either named under a contract or is capable of being ascertained by arithmetical calculation from the agreed terms of a contract. When a claim is for a liquidated sum then the particulars of the contract by virtue of which it is claimed should be disclosed in the statement of claim. In the civil action under consideration, the statement of claim does not disclose:—

(a) The nature of the instrument under which the money was lent;

(b) Whether the plaintiff signed it as a joint debtor or a surety only;

(c) The date when the debt fell due;

(d) The rate of interest charged; and

(e) The date on which the debt was settled by plaintiff.

In the absence of the abovementioned particulars from the statement of claim, the learned magistrate should have ordered the plaintiff to file an amended statement of claim under Order X rule 12(1) for non-compliance with the provisions of Order X rule 1 before acting, as he did, under Order XIX rule 3(1)(b)(i) or in the alternative, he could have in the absence of the defendant proceeded to hear and determine the action before pronouncing judgment as provided under Order XIX rule 19(3)(1)(b)(ii) of the Subordinate Courts Rules. It is true that in this case the defendant did not file a statement of defence as required under Order X rule 3(1) but the omission could only have at most precluded him, at the discretion of the magistrate, from appearing and defending the action by virtue of Order X rule 7; but the omission does not, in my opinion, relieve the court of its duty to ensure that the pleadings are in order or to "hear and determine" the action under Order XIX rule 3(1)(b)(ii).

I hold that the failure of the defendant to file a statement of defence in this case was not due to negligence or want of diligence and that he should be given an opportunity to defend the action. Having regard to all the circumstances of the case and to the law as expounded in *Walmershausen* v. *Gullick* [1] to the effect that the contingent liability of a surety is a debt payable in bankruptcy even though it was not "ascertained at the time of the bankruptcy, nor included in the schedule of liabilities or in the claim of proof", I hold that this is a proper case for the High Court to set aside the judgment and decree dated the 12th of September.

One complication which may arise in the event of an order for re-hearing would be in regard to a sum of $100 which the plaintiff has recovered on the decree under a judgment debtor summons; but I think that the difficulty could be resolved by the learned magistrate making an order, in the event of the defendant being successful in his defence, directing the plaintiff to refund the sum of $100 and any other sum which he may have recovered under the decree.

I wish however to make it clear that my remarks in the course of this judgment should not be taken as pre-judging the issues in this case. The facts which had come to light as the result of my perusal of certain records is not evidence and the learned magistrate should rehear and determine this action strictly on the basis of the evidence adduced before him.

The judgment and decree passed in Parit Buntar Magistrate's Court Civil Action No. 107 of 1964 is therefore set aside and the action remitted to the court of original jurisdiction for re-hearing under the following directions:—

(a) The plaintiff do within 14 days from the date of service of this order upon him deposit in court the sum of $100 or any other sum obtained by him from the defendant under the judgment debtor summons taken out in this proceeding, and that the said sum do remain in court pending the determination of this action.

(b) That, subject to compliance with (a) above, the plaintiff do within 14 days from the date of service of this order upon him file a fresh amended summons and statement of claim incorporating the particulars mentioned in paragraph 10 of this judgment and have the same served upon the defendant.

(c) That the defendant do thereafter file and cause to be served on the plaintiff his defence in the form and within the time prescribed under rule 3(1) of Order X.

(d) If the plaintiff fails to comply with paragraphs (a) and (b) above, judgment be entered for the defendant with costs, and an order made that the sum of $100 or any other sum or sums paid under the judgment debtor summons be repaid by the plaintiff to the defendant.

Order accordingly.

RE CHOP CHAI SOON, A BANKRUPT

[O.Bk.J. (MacIntyre) April 5, 1965]

[Ipoh — In Bankruptcy No. 90 of 1963]

Bankruptcy — Debts of honour — Preferential treatment over other debts — Whether fraudulent preference — Bankruptcy Ordinance, 1959, ss. 53(1), 54.

The bankrupt utilised money which he had realised by sale of his assets, after committing an act of bankruptcy, in settling the claim of those creditors whose money were deposited with him in preference to settling

his trade debts. It would appear that these creditors including the respondent were accorded preferential treatment because the bankrupt regarded these debts as debts of honour.

Held: this discrimination amounted in law to fraudulent preference.

Cases referred to:—

(1) *Ex Parte Kelly & Co. in Re Smith, Fleming & Co.* (1879), 11 Ch.D. 306, 311.

(2) *Sharp* v. *Jackson* [1899] A.C. 419.

(3) *N. Subramania Sastrulu & Anor.* v. *Official Receiver* A.I.R. 1941 Mad. 274.

(4) *Re Mok Peng Chia trading as Chop Chia Moh; Ex Parte Official Assignee* [1958] M.L.J. 202.

BANKRUPTCY MOTION.

W. S. W. Davidson for the applicant.

N. Sharma for the respondent.

MacIntyre J.: The bankrupt in this case was the sole proprietor of a provision dealers business which he carried on under the name and style of Chop Chai Soon at No. 3 Market Terrace, Ipoh. By the middle of 1963 the business was failing and by a circular letter dated 13th July 1963 (Exh. A1) he notified his unsecured creditors of his inability to meet his liabilities amounting to $76,770.42 and offered to pay 25 cents in the dollar by way of composition. The aforesaid amount of $76,770.42 included a sum of $4,000 which according to the books of account of Chop Chai Soon stood to the credit of Toh Choo Weng, the respondent herein, who is also the son-in-law of the bankrupt.

Then on the 15th of August 1963, Messrs. Harper Gilfillan & Co. presented a creditor's petition against the bankrupt but before an order was applied for the bankrupt filed his own petition in bankruptcy on the 23rd of October 1963 and was adjudicated a bankrupt on the 28th of October. Subsequently, he submitted a number of statements of account to the Official Assignee which were produced at this hearing and marked A2, A3, A4, A13, A14 and A15 (with translations marked A2T, A3T, A4T, A13T, A14T and A15T).

Under item 2 of A4, the bankrupt disclosed the payment of $3,000 and $1,000 on the 25th day of July and 2nd day of August 1963 respectively in settlement of the amount due to the respondent, and described the liability "as money deposited for safe-keeping without interest". It also appears from A4, that certain sums owing to three other persons who were also said to have deposited their money for safe-keeping had been settled in the month of July after the bankrupt had sent out A1 notifying his creditors of inability to pay his debts in full.

The public examination of the debtor took place on the 7th of February 1964 and a certified copy of the notes of evidence recorded at that enquiry is marked Exh. A8 in these proceedings.

A creditors' meeting held on the 6th of May 1964 authorised the Official Assignee to institute proceedings against the respondent and the other creditors who had been paid as disclosed in A4 for the recovery of the amounts paid on the ground of fraudulent preference. In consequence the present application was filed against the respondent by way of notice of motion.

To the affidavit dated 4th August 1964 filed in support of the notice of motion and affirmed by Harry Noel Dias, the assistant official assignee, Ipoh, are exhibited copies of two letters marked HND 1 and HND 2 dated the 20th of March and the 27th of March 1964, respectively. HND 2 is a reply by Messrs. Balwant Singh & Co. the solicitors for the respondent to HND 1 which is a letter of demand by the assistant official assignee for the refund of the sum of $4,000 to the estate of the bankrupt. Paragraphs 2 and 3 of HND 2 reads:

> "Our client says that the said sum of $4,000 paid to him was not money due and owing from the bankrupt to our client but was money which our client sent to the bankrupt to purchase certain goods on his behalf. Our client then informed the bankrupt that he did not require the goods and requested the bankrupt to return the said sum which the bankrupt did."

> "The said sum was in fact held by the bankrupt in trust for our client."

Then in an affidavit sworn on the 24th of September 1964 by the respondent and filed in these proceedings he says in paragraph 2:

> "I say that the sum of $4,000 paid to me by Tang Ewe Soo proprietor of Chop Chai Soon was the amount I had deposited with Tang Ewe Soo for the purchase of provisions and foodstuffs in connection with my contract in Ipoh. I further say that he held that money as my agent. He did not pay me his money but it was my money which was with him which he repaid."

At the hearing of this application the bankrupt (A.W.1) said that in 1958 he became the respondent's agent in respect of a contract to supply foodstuffs to the Royal Army Service Corps at Ipoh, and that the sum of $4,000 was deposited with him for the purchase of foodstuffs and for payment of wages to the respondent's employees. He further said that the respondent, from time to time, re-imbursed the amounts spent by him. However, he admitted that the amounts paid out in connection with the contract were not entered in his books and that he obtained re-imbursement by producing the relevant vouchers and receipts. He also said that the respondent on one or two occasions authorised him to make use of a part of the money for his (bankrupt's) own use, provided the amount was replaced; but admitted that when he eventually made use of the whole sum he did not obtain the respondent's consent. The respondent (R.W.2) maintained that the bankrupt had no general authority to use the money but admitted telling him that he could do so provided the amount was replaced within 2 or 3 days.

One of the issues to be decided in this application, in regard to the sum of $4,000 deposited by the respondent with the bankrupt, is whether the relationship created thereby was that of trustee and *cestui que* trust or debtor and creditor.

The evidence, in my opinion, clearly points to a debtor-creditor relationship. It is significant that the word "deposit" first appears against the respondent's account in the ledgers of Chop Chai Soon only in 1963 (C5). That word is conspicuous by its absence in the 1961 and 1962 ledgers (C6 and C7). This entry could therefore have been made at any time before the books were handed to the assistant official assignee. The only explanation the bankrupt could give for the omission to enter the word "deposit" in the 1961 and 1962 ledgers is negligence of duty on the part of his clerk.

It is quite clear from the evidence that the bankrupt had treated this transaction as a loan until the question of fraudulent preference cropped up. He had included the amount with debts to sundry creditors in A1. In his public examination (A8), he maintained that the money was left with him in trust with full authority to use it and to return it only when demanded. If such a transaction is not a loan transaction I do not know what is. Although the bankrupt was examined and cross-examination about the nature of this transaction at the public examination, he made no mention whatever of the money having been sent to him for the purpose of buying goods for the respondent or of the amount being deposited in connection with the respondent's contract with the R.A.S.C. These issues were raised only after the assistant official assignee had decided to take action against the respondent for the recovery of the amount. I have already referred to HND 2, according to which the respondent had instructed his former solicitors to say that the money was sent to the bankrupt to purchase certain goods for him but the amount was refunded when the order was cancelled. Nowhere in his evidence did the bankrupt confirm this story. Nor did the respondent pursue it any further. According to his affidavit of the 24th of September 1964 the $4,000 was money deposited to purchase provisions in connection with the respondent's contract in Ipoh. While giving evidence in court he did not stick by his original instructions to his solicitors, namely, that he demanded the return of the money because he did not want the goods he had ordered, but said instead that he asked for the return of the money because his contract with the R.A.S.C. was about to expire.

It is not disputed that the respondent had a contract in Ipoh but I have formed the opinion that the respondent's accounts in C5, C6 and C7 have nothing whatever to do with that contract. It is inconceivable that a business man of the bankrupt's standing would have, in the first place, entered the amount he had received as an agent in respect of the R.A.S.C. contract in the account books of Chop Chai Soon and in the second place, not to have debited in the accounts the amounts he had expended from time to time in connection with the contract. It is more likely that the nature of the transactions shown in C5, C6 and C7 was that of a loan or loans made to the bankrupt by his son-in-law to tide over his financial difficulties.

On the evidence as a whole, I have no hesitation in holding that the business relationship between the bankrupt and the respondent was that of debtor and creditor. Since, however, it is also clear from the evidence that the bankrupt had made use of the $4,000 for his own purposes, the question of whether the relationship was that of a trustee and *cestui que* trust is no more of any importance. As James L.J., observed in *Ex Parte Kelly & Co. in Re Smith, Fleming, & Co.*[1]:

> "No doubt if a trustee commits a breach of trust, by stealing or otherwise misappropriating the trust moneys, he becomes a debtor to his *cestui que* trust in respect of the money which he has thus improperly taken, and if he becomes a debtor in that way, he remains only a debtor, the *cestui que* trust only a creditor, unless he can 'ear-mark' the money which the trustee has misappropriated."

In answer to a question by the court the bankrupt said that the sum of $4,000 paid to the respondent was provided by his wife from her private resources. According to A2, however, it is clear that the bankrupt paid a sum of $16,968.73 to sundry creditors between the 8th of July and the 28th of October 1963. Under list D (A4) in A2 the sum of $9,948.88 is shown to have been paid to sundry creditors includes the sum of $4,000 paid to respondent. A2 also shows that the sum of $16,968.73 was paid out of sums realised from the bankrupt's assets which stood at $21,330.42 on the 8th of July 1963. I am therefore satisfied that the sum of $4,000 was not paid from the funds of the bankrupt's wife but was paid out from the bankrupt's money.

Section 53(1) of the Bankruptcy Ordinance 1959 corresponds to section 54 of the Indian Provincial Insolvency Act, 1920. *Mulla* on "The Law Of Insolvency In India" (2nd Edition) at pages 625 and 633 lists the 5 essentials of fraudulent preference. They are:—

1. The debtor must at the date of transfer or payment be unable to pay from his own money his debts as they became due;
2. The transfer or payment must be in favour of a creditor;
3. The transfer or payment in fact prefers one creditor over others;

4. The transfer or payment must have been made with a view of giving such creditor a preference over other creditors; and

5. The debtor must be adjudged insolvent on a petition presented within 3 months after the date of the transfer or payment.

The fact that the payments to the respondent were made on or about the 25th of July and the 2nd of August 1963 is not disputed. That at the time of payment the bankrupt was unable to pay from his own money his debts as they fell due is evidenced by A1, R9, R10, R11 and R12 and confirmed by the evidence of the bankrupt (A.W.1) in court as well as at his public examination (A8); and also by the evidence of the respondent (R.W.2) and his wife (R.W.1). I have already given my reasons for holding that the business relationship between the bankrupt and respondent was that of debtor and creditor. It is not also disputed, and the evidence on this point is quite clear, that the bankruptcy petition was presented on 21st October 1963. What remains to be decided are whether the payment in fact prefers one creditor over the others and whether the payment made to the respondent was made with a view of giving him such a preference.

In my opinion, the evidence points to a preference being given to one class of creditors as against the others. That is the conclusive inference to be drawn by a perusal of A3, A4, A13 and A14. I shall deal with A3 and A14 first.

A3 is a list of 21 European firms to whom the bankrupt was indebted in the sum of $26,737.72 as on 8th July 1963. The only payment made in respect of this account was $29.40 to the Anglo-Thai Corp. Ltd. on 29th July 1963. A14 is a list of 37 outstation creditors to whom the bankrupt was indebted in the sum of $17,520.09 as on 8th July 1963. Various sums totalling $687.10 were paid to some of the creditors but except for a sum of $3.00, these amounts were paid before 3 months of the date of presentation of the bankruptcy petition.

I now come to consider A4 and A13. A4 is a deposit and loans account under which the bankrupt is shown as owing $14,754.10 as on 8th July 1963. Items 3 and 6 of this account refer to loan transactions with one M. Meyappa Chettiar to whom the bankrupt owed in all a sum of $3,180 and interest. He was paid only a sum of $100 on 2nd September 1963. Item 4 refers to a hire purchase deal with Nanyang Finance Company Ltd. The sum of $1,800 then outstanding was settled in full on 24th July 1963. Of the remaining 5 items in A4 one relate to a loan acccount in respect of which nothing was paid. The other 4 items, namely, items 1, 2, 5 and 7 relate to accounts described as "money deposited for safe-keeping without interest". Item 2 of this account relates to the $4,000 owing to the respondent. Now the total amount paid to the creditors as shown in A4 is $9,948.88 but out of this sum $8,048.88 was paid in respect of these 4 items within 3 months of the presentation of the bankruptcy petition. A13 is a list of outstation creditors to whom the bankrupt owed $17,127.36 as on 8th July 1963. The amounts paid totalled $6,303.35 and a substantial portion of it was paid before 3 months of the presentation of the bankruptcy petition. But the significant point is that $5,251.57 out of the sum of $6,303.35 was paid to only 3 creditors mentioned in items 1, 3 and 17 and all of whom are said to have deposited money without interest. In other words, the indications are there in A4 and A13, that the bankrupt was making every effort to pay off those who had advanced him money without interest in preference to paying off his trade debts.

Before dealing with the more specific point as to whether or not the bankrupt made the payment to respondent with a view of giving him a preference over other creditors, I must refer to section 54 of the Bankruptcy Ordinance 1959. This section was enacted to give protection to *bona fide* transactions without notice and provides that in the case of bankruptcy, any payment made by a bankrupt to a creditor shall not be invalid under the Ordinance if the payment was made before the date of the receiving order and the recipient at the time of payment had no notice of any available act of bankruptcy committed by the bankrupt before that time.

There is, of course, no dispute over the fact that the receiving order was made after the respondent received the money but it is equally clear that the respondent was aware of the financial plight the bankrupt was in before the latter committed an act of bankruptcy by issuing A1 on 13th July 1963. The correspondence exchanged between the bankrupt and the respondent bears eloquent testimony to this fact. In R9, the respondent refers to the many occasions he had gone to Ipoh to ask for his money and also of the requests made by his wife without any success. In R10 the bankrupt tells the respondent that he was unable to return the money owing to financial difficulties. Further it is difficult to believe that the respondent was unaware of the issue of A1, even if it was not served on him, in view of the special relationship which existed between him and the bankrupt as creditor and son-in-law. In fact it appears to me that it was the knowledge of the bankrupt's financial plight that intensified the respondent's efforts to get his money back.

This brings me to a consideration of the plea that the bankrupt was induced to pay the respondent under pressure and not through a voluntary preference in his favour. The questions posed by the facts of this case are (a)

whether the dominant intention of the bankrupt in paying the debt was to favour his son-in-law as against other creditors or (b) was the dominant intention to avoid his daughter's marriage being broken up which the respondent threatened to do if he was not paid.

In *Sharp* v. *Jackson*,[2] it was held by the House of Lords that since the dominant intention of the insolvent in conveying certain real property to certain creditors was not to show favour to one set of creditors as against another but to shield himself from the consequences of his breaches of trust, there was no fraudulent transfer within the meaning of section 48 of the Bankruptcy Act of 1883 which corresponds to section 53(1) of our Bankruptcy Ordinance 1959. In *N. Subramania Sastrulu and Another* v. *Official Receiver*,[3] King J., following the principles established by English authorities ruled that the mere show of preference is not sufficient to set aside an alienation of property but it must be shown that the dominant intention in the mind of the insolvent was to prefer the creditor.

Evidence was adduced to show that the dominant motive of the bankrupt in paying the respondent's debt was the fear that if he did not do so the respondent would carry out his threat and break up his marriage and send his wife back to the bankrupt's paternal care. There is also evidence of a veiled threat to take legal or police action against the bankrupt in R9 if the bankrupt failed to pay up the debt. The respondent says in that letter: "Had it not been a question of our relationship, I would have made a report to the police or taken legal action against you" and concludes by saying, "In future please do not say that I have not given you sufficient notice."

With regard to the veiled threat, I will say that there is no evidence whatever to show that the bankrupt took it seriously. In his evidence in court in regard to R9, all what he had to say was: "I understood from that letter that the respondent would have taken me to court for not returning the money had it not been that he was married to my daughter." Further, in his evidence at his public examination he said (*vide* P6 of A8): "No. 2 (respondent) came personally to see me to ask for the return of his deposit because he wanted to fulfil a contract. He did not threaten me with legal proceedings for non-payment." And again: "The payments made in D7D (A4) were made without any threat of legal proceedings or any demand in writing."

If the bankrupt's dominant motive in paying the money to the respondent was fear of his daughter's marriage being broken up, he could have said so in the course of his evidence at his public examination; but there was not even a whimper of it. I have no doubt that the respondent and his wife quarrelled over the matter and I am also prepared to concede the possibility of the respondent having issued the threats now complained of, but the question to which I shall have to find the answer is whether or not it was the alleged threat which induced the bankrupt to settle the respondent's claim.

Now, if the fear posed by the threat did in fact dominate the mind of the bankrupt there was no compulsion to give preferential treatment to some other creditors as well. I have already pointed out that according to A3, A4, A13 and A14 the bankrupt had shown a marked preference to settle debts which were money deposits without interest over trade debts. This fact is confirmed by the bankrupt's own evidence at his public examination (*vide* pages 5 and 6 of A8). This is what he said:

> "These 'creditors' I paid could not be classified as 'creditors' because they were people who entrusted me with money. I admit that the assets collected between 13.7.63 and my bankruptcy were paid to certain people. The amount paid amounted to some $16,000 and because of this payment to certain persons I was not able to make any offer at the time of the bankruptcy
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> . . . . . .
>
> The people paid in full or almost in full in D7D (A4) were people who entrusted me with money. Persons No. 5 in D7D and No. 2 (respondent) were paid in full. No. 2 left money with me for safe-keeping and with his permission I used it and it was to be paid at short notice."

It is therefore clear that the bankrupt utilised the money which he had realised by the sale of his assets, after committing an act of bankruptcy on 13th July 1963, in settling the claims of those creditors whose money were deposited with him in preference to settling his trade debts. It would appear that these creditors including the respondent were accorded preferential treatment because the bankrupt regarded these debts as debts of honour. In other words, he was impelled by a sense of moral obligation to prefer this class of creditors as against the traders. This discrimination amounts in law to fraudulent preference. As observed by Whitton J. in *Re Mok Peng Chia trading as Chop Chia Moh; Ex Parte Official Assignee*[4]: "It is settled law that payment from a sense of duty or moral obligation is not alone sufficient to prevent a payment from being fraudulent."

Learned counsel for the respondent submitted that I should consider the evidence in this case in the Asian context. It is interesting and relevant to note that in *Re Mok Peng Chia etc.*, *supra*, the court took judicial notice of a moral obligation under Chinese custom to repay in full loans without interest received from relatives.

I hold that the dominant motive of the bankrupt in paying the sum of $4,000 to the respondent was to show preference to him as a member of a class of creditors to whom he wished

to accord preferential treatment over other creditors.

On these grounds I hold that the Official Assignee is entitled to the orders prayed for in the motion and I order accordingly.

Order accordingly.

Solicitors: *Gibbs & Co.; N. Sharma.*

ANDAVAN v. THONG NYIK LIN

[O.C.J. (Ismail Khan J.) April 13, 1965]

[Seremban — Originating Summons No. 15 of 1963]

Practice and procedure — Res Judicata.

The respondent had executed two charges over her land in favour of the applicant, a moneylender. The applicant brought an action to enforce the security. The application was resisted, *inter alia*, on the ground of *res judicata*. It appeared that the applicant had brought a previous application against the respondent and this had been dismissed on a preliminary point, namely that there was no compliance with section 21 of the Moneylenders Ordinance, because of the applicant's failure to produce the statement of accounts when the summons was issued.

Held: the plea of *res judicata* cannot succeed as the former application had been dismissed on a technical defect in the proceedings and there had been no judicial determination of the matter directly and substantially in issue between the parties.

Cases referred to:—

(1) *Kali Krishna Tagore* v. *Secretary of State* I.L.R. 16 Cal. 173.

(2) *Putali Meheti* v. *Tulja* I.L.R. 3 Bom. 223.

(3) *Pethaperumal Chetti* v. *Murugandi Servaigaran & Ors.* I.L.R. 18 Mad. 446.

ORIGINATING SUMMONS.

N. Ramachandran (*Saraswathi Devi* with him) for the applicant.

S. Ponniah for the respondent.

Ismail Khan J.: The respondent had executed two charges over her land comprised in Negri Sembilan Certificate of Title No. 9090 for Lot No. 6444 Town and District of Seremban in favour of the applicant, a moneylender, as security for two sums of $6,700 and $4,000 lent to her. The two charges were executed on 6th October and 14th November, 1961, respectively. In these proceedings the applicant seeks to enforce his security, the respondent having made default in payment of the sums due in respect of the two charges.

The application is resisted on several grounds, one of them being that the matter is *res judicata*. It was agreed that this plea of *res judicata* should be dealt with first. It was pointed out by Mr. Ponniah for the respondent that the applicant had brought a similar application in Originating Summons No. 62 of 1962 which was dismissed and that such dismissal precluded a fresh action. To invoke the doctrine of *res judicata* the respondent has to show that there was a former suit between the same parties for the same matter and upon the same cause of action, and also that the matter directly and substantially in issue has been heard and finally decided by the court which heard it.

To see what was decided in the previous application, it is necessary to look at the judgment itself, because, as was observed by the Privy Council in the case of *Kali Krishna Tagore* v. *The Secretary of State*:(1)

> "In order to see what was in issue in a suit or what has been heard and decided, the judgment must be looked at. The decree is only according to the Code of Civil Procedure to state the relief granted or other determination of the suit. The determination may be on various grounds, but the decree does not show on what ground, and does not afford any information as to the matters which were in issue or have been decided."

It is clear from the judgment in Originating Summons No. 62 of 1962 that the application was dismissed on a preliminary point taken, namely, that there was no compliance with section 21 of the Moneylenders Ordinance, 1951, because of the applicant's failure to produce the statement of account when the summons was issued. It was held that the proceedings were void *ab initio*.

In the case of *Putali Meheti* v. *Tulja*,(2) West J. said:—

> "When a suit has failed through a formal defect, and the merits have not been so pronounced on as to constitute a legal relation resting on the act of the court, another suit is not, by the English law, barred. This rule is consonant to justice and agrees with the law as set forth in the Code of Civil Procedure."

In the case of *Pethaperumal Chetti* v. *Murugandi Servaigaran & Ors.*,(3) the plaintiff sought to recover principal and interest due on a bond executed by the defendants in favour of his father (deceased). The plaintiff had previously brought a similar suit which was dismissed because the plaintiff had failed to produce a succession certificate. It was held that the previous proceedings did not bar a fresh suit. Subramania Ayyar J. referred with approval to the remarks of West J. in the case of *Putali Meheti* v. *Tulja* and said:—

> "It appears to me that the real effect of a failure to produce a certificate....whether such production should take place at the institution of a suit or at some later stage, is to prevent a court from pronouncing on the merits so as to render its decision an adjudication having the force of *res judicata*."

In the light of the above authorities and bearing in mind the reasons for the dismissal of the application in Originating Summons No. 62 of 1962, it seems to me that the former judgment proceeded wholly on a technical defect in the proceedings. There was no judicial determination of the matter directly and substantially in issue between the parties, namely, liability of